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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 686

**GUY A. THOMPSON, TRUSTEE OF THE MISSOURI
PACIFIC RAILROAD COMPANY, A CORPORATION,**

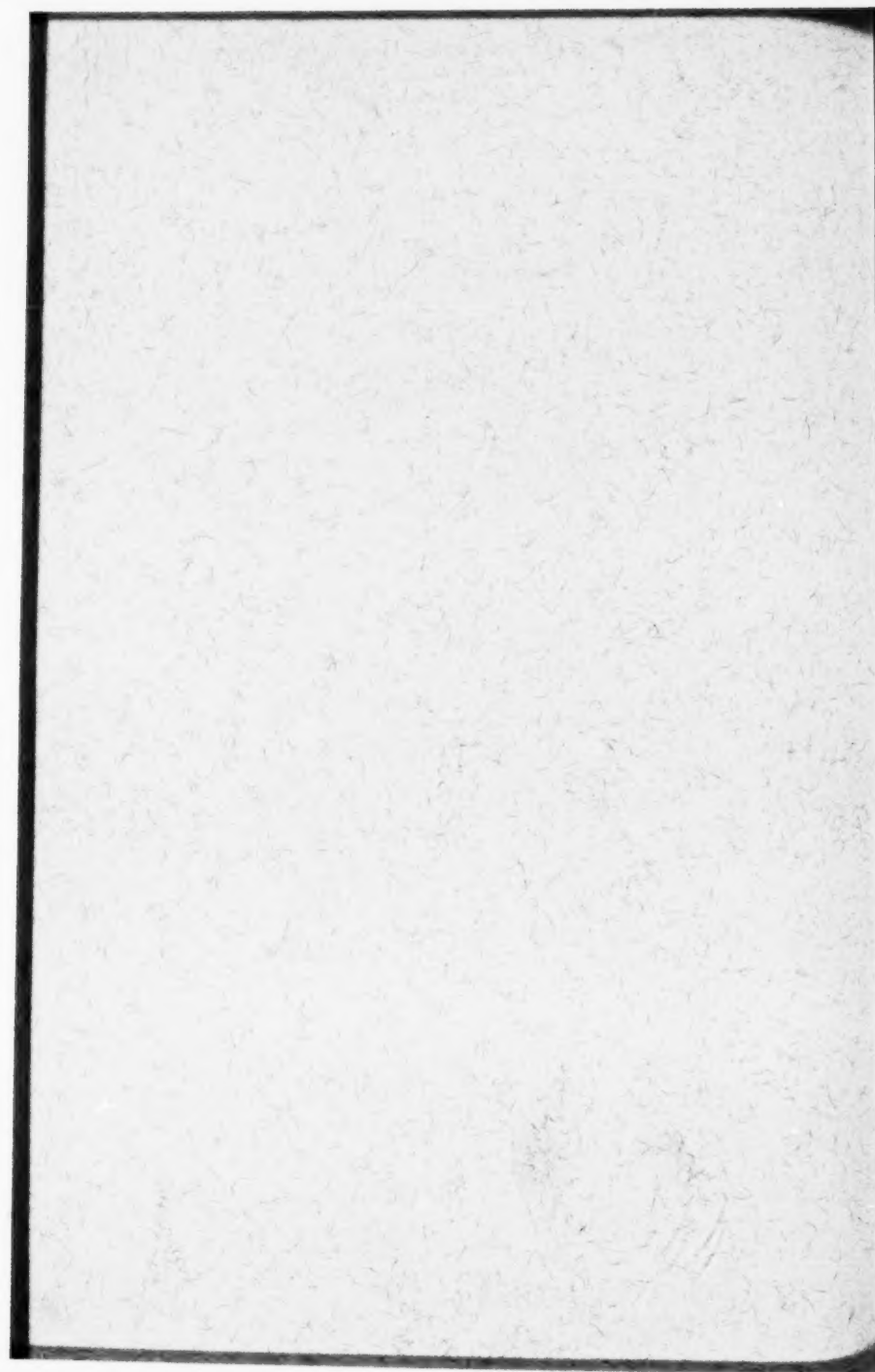
Petitioner,

vs.

**LOUISE F. McPHERSON, ADMINISTRATRIX OF THE ESTATE
OF JASON B. McPHERSON, DECEASED.**

**PETITION FOR WRIT OF CERTIORARI TO THE
SPRINGFIELD, MISSOURI COURT OF APPEALS
AND BRIEF IN SUPPORT THEREOF.**

**THOMAS J. COLE,
DEWITT C. CHASTAIN,**
Counsel for Petitioner.



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LOUISE F. McPHERSON, ADMINISTRATRIX OF THE ESTATE
OF JASON B. McPHERSON, DECEASED.

**PETITION FOR WRIT OF CERTIORARI TO THE
SPRINGFIELD, MISSOURI COURT OF APPEALS.**

The petitioner, Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation, respectfully shows to the Court:

A.

Summary Statement of the Matter Involved.

The action, a review of which is sought, is one for wrongful death of an employee of a common carrier while engaged in interstate commerce, and was based on the Federal Employers' Liability Act (Title 45, Section 51, U. S. C. A.).

The petitioner is the Trustee of the Missouri Pacific Railroad Company, duly appointed pursuant to Section 77 of the

Act of Congress relating to Bankruptcy, and was operating the railroad at the time of the injuries which resulted in the death of Jason B. McPherson, a section foreman. Judgment in the sum of Five Thousand Dollars was rendered in favor of the administratrix for the benefit of the widow and a minor child, by the Circuit Court of Barton County, Missouri in the September, 1941 term thereof, and this judgment was affirmed by the Springfield Court of Appeals.

The facts as found by the Court of Appeals in its opinion (R. 74) are that:

Jason B. McPherson, a section foreman for the defendant, was killed on January 30, 1940 when the motorized handcar on which he was riding, and of which he was in charge, collided with a truck at the intersection of the railroad track which runs north and south, and an east and west public highway south of Independence, known as 39th Street.

On this day the deceased had joined crews with that of section foreman Hanes and gone on the deceased's motorized handcar south of Independence where the two crews engaged the day in cutting weeds and cleaning up the right-of-way. The deceased was in charge of the combined gangs, and was the superior of everyone in them, including foreman Hanes, and had supervision over and control of the motor car on which the section men were riding. When the day's work was done, the men boarded the motor car and started north to Independence. There were five men on the motor car which was operated by Ted Strohm who sat on the left or west side about the middle of the car. The car had a hand brake and a hand throttle. On the same side and back of Strohm sat Mr. McFarland. On the right or east side were three men; the deceased McPherson, the foreman, sat at the front in a slanting position and had hold of the rail at the front end of the motor car. He could see west, north

and east. South of him and facing east were Mr. Hanes and another section man; there was no one on the front end of the west or left side of the motor car. As the foreman in charge of the gang it was the deceased's duty to ride in this position where he could observe and control the movements of the motor car. As the motor car approached 39th Street it slowed its speed down to about four miles per hour, and when within six or eight feet of the crossing, which was a plank crossing 24 feet long north and south, the deceased McPherson signalled to operator Strohm to come on and go across the crossing, and the motor car came on over the crossing, and near the north end thereof collided with a truck which was traveling eastwardly on 39th Street, derailing the motor car and killing Mr. McPherson. Just before the motor car started over the crossing the deceased McPherson had looked to the west and to the east and had motioned to Strohm to come on across. It was the deceased McPherson's duty when he arrived at the crossing to signal the operator of the motor car whether or not he should go on across. It was a cloudy day but there was no mist or fog, but there was snow and ice on the pavement, and the truck approached from the west on the icy, black top pavement, slightly downgrade, at a speed variously estimated at from 15 to 45 miles per hour. When the truck was about 100 feet from the railroad track the driver of the truck applied the brakes which caused it to sway and skid, and the driver to lose control of it. The truck got down almost to the railroad track when it turned to the north and ran along the crossing the same direction the motor car was going, then cut over in front of the motor car at the north side of the crossing, and caused the collision. There was no evidence as to whether Strohm, the operator of the motor car, saw the approaching truck or not, nor whether he did anything, but the motor car did not change its speed very much. The motor car

could have been stopped by use of the brake within a distance of six to ten feet.

The truck driver, McClenagan, a witness for the plaintiff, stated he approached the crossing at a speed of 15 miles per hour, and that the motor car was 25 feet south of the crossing when he first saw it from a distance of 100 feet west of the track. Other witnesses for the plaintiff said the truck was going from 35 to 45 miles an hour, and that the motor car was half way over the crossing when they first saw the truck about 100 feet to the west, and at that time the truck driver applied his brakes. Both Mr. McFarland and Mr. Hanes were called as witnesses by the plaintiff and they, with the truck driver, were the only witnesses who testified concerning the accident. The defendant offered no evidence, and stood upon the plaintiff's case.

In addition to the above facts, plaintiff's witness, Hanes (R. 25), testified it was McPherson's duty to see that the highway was clear and that he could get across it before he permitted the operator of the motor car to start across; that in the position in which the deceased sat he had the most advantageous position to see if there was anything on the highway to interfere, and (R. 25) testified it was his (McPherson's) motor car and he was in charge of it, and everybody on it was required to do what he said. It was his duty to keep a vigilant lookout at highway crossings for vehicular traffic or any kind of traffic, and both of said witnesses (McFarland (R. 20) and Hanes (R. 26)) testified that when the truck driver put on the brakes and started swaying, you could not tell whether he was going to hit the motor car or get off in front of it, and that the driver of the motor car wouldn't know whether to stop and let the truck get ahead of him, or try to get ahead of it. The truck driver, McClenagan, testified (R. 28) that he turned his truck to the north to keep from having a collision and that he thought that by so doing it would give the motor car time to go by.

Verdict and judgment for Five Thousand Dollars against the petitioner were rendered on September 17, 1941 (R. 10), and an appeal was duly taken to the Springfield Court of Appeals (R. 11) where the judgment of the lower court was affirmed by said appellate court on July 27, 1942 (R. 73). Timely motions for rehearing and for a modification of the opinion filed in the Springfield Court of Appeals on August 1, 1942, were overruled on August 24, 1942 (R. 80), and thereafter a timely application for a writ of certiorari to review the action of the Springfield Court of Appeals was made to the Supreme Court of Missouri on September 17, 1942 (R. 81), and the Supreme Court of Missouri denied said petition for certiorari on November 12, 1942 (R. 101), and stay of mandate was duly granted (R. 103).

B.

Basis for Jurisdiction.

The judgment of the Springfield Court of Appeals of Missouri determined rights claimed under the Federal Employers' Liability Act. Jurisdiction of this Court is urged under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stats. 937 (U. S. Code Annot., Title 28, Section 344, Paragraph b).

C.

Questions Presented.

1. Whether the evidence is sufficient in kind or amount to show negligence on the part of the petitioner.
2. Whether the Springfield Court of Appeals has sustained a verdict based upon speculation and conjecture.
3. Whether the Springfield Court of Appeals has failed to accept the interpretation of this Court as to the basis of liability under the Federal Employers' Liability Act.

4. Whether recovery can be had for the death of the deceased foreman, McPherson, for the alleged negligence of an employee who acted under the express orders and was under the absolute control of said deceased.

D.

Reasons Relied Upon for the Allowance of the Writ.

The questions presented arise under the Federal Employers' Liability Act (45 U. S. C. A. Section 51) and are federal questions. Under the Act recovery cannot be had except for negligence, and on certiorari this Court will examine the record and determine if the evidence is sufficient in kind and amount as a matter of law to show negligence and to determine whether the case rests on negligence or upon speculation and conjecture.

The Springfield Court of Appeals has failed to accept the interpretation of this Court as to when liability arises under said Act, and has failed to consider and follow the decisions of this Court in *Davis v. Kennedy*, 266 U. S. 147; *Unadilla Valley Ry. Co. v. Caldine*, 278 U. S. 139, and like decisions, and the decision of the Springfield Court of Appeals is not in accord with applicable decisions of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued by this Court, directed to the Springfield Court of Appeals of the State of Missouri, commanding that Court to certify and send to this Court a complete transcript of the record and proceedings in the case of Louise F. McPherson, Administratrix of the Estate of Jason B. McPherson, deceased, *v. Guy A. Thompson*, Trustee of the Missouri Pacific Railroad Company, No. 6354; and that said cause be reviewed and determined by this Court; and that the finding and judgment of said Springfield Court of

Appeals be reversed by this Honorable Court; and that your petitioner have such other and further relief as to this Honorable Court seems proper.

GUY A. THOMPSON, Trustee of the
MISSOURI PACIFIC RAILROAD COMPANY,
By THOMAS J. COLE,
DEWITT C. CHASTAIN,
Counsel for Petitioner.